

Exhibit No. 2Date 1-17-2011Bill No. SB 145

Senate Bill 145
January 17, 2011
Presented by Bob Lane
Senate State Administration

Mr. Chairman and committee members, I am Bob Lane, Chief Legal Counsel of Montana Department of Fish, Wildlife & Parks (FWP). I am here in opposition of Senate Bill 145. I am representing the Administration generally and FWP specifically.

SB145 violates two fundamental concepts of state government that the public approved in adopting the Montana Constitution. It violates the separation of powers among the three branches of governments and it exceeds the power of the law-making function of the legislature. The practical application of this bill should give all members of the legislature pause, because the will of the majority in passing a delegation of rulemaking to an agency may be vetoed by a minority of the legislative body in numbers, in party affiliation, or in their position on the original delegation of rulemaking.

The legislature can act only through a majority of its members. Art. V, § 11(1) of the Montana Constitution states in pertinent part: "No bill shall become law except by a vote of the majority of all members".

The Governor is constitutionally delegated the power to "see that the laws are faithfully executed." Art. VI, § 4(1), Montana Constitution. The departments or agencies are under "the supervision of the governor." Art. VI, § 8, Montana Constitution.

The Montana Supreme Court in 1975 addressed a similar attempt of a legislature to delegate to a subcommittee or interim committee the power to approve budget amendments. The Court declared this unconstitutional:

But, the 1975 Montana Legislature . . . empowering the Finance Committee to approve budget amendments delegated a power properly exercisable only by either the entire legislature or an executive officer or agency, to one of its interim committees. Such a hybrid delegation does not pass constitutional muster. The power in question here resides in either the entire legislative body while in session or, if properly delegated, in an executive agency. Clearly the action of the Finance Committee does not constitute the action of the entire legislature.

State ex rel. Judge v. Leg. Finance Comm., 168 Mont. 470, 477.

However, the application of SB145 would be the most troubling. For FWP the rulemaking review committee is the Environmental Quality Council (EQC) which is composed of 3 Senators and 3 Representatives from the majority party and 3 Senators and 3 Representatives from the minority party plus 4 members from the general public. The membership is equally divided between Republicans and Democrats.

Assume the Republican controlled 2011 Legislature amends some rulemaking authority of FWP to constrain, restrict, and condition previously granted rulemaking authority. Then the Democratic members plus 2 of the four public members (or at least 1 public

member plus one Republican) refuses to confirm the newly delegated and restricted rulemaking authority. Remember, this bill only requires a tie vote to fail to confirm rulemaking authority. This would then mean the will of the legislature was overturned by a minority and FWP, in this hypothetical, could use its old rulemaking authority without regard for the majority's attempt to constrain, restrict, or condition its rulemaking authority.

Further, I believe other agencies will testify about the considerable additional time to adopt rules. The will of the majority of the legislature and the interests of the public will not be well served by such delay.